

IN THE HIGH COURT OF KERALA AT ERNAKULAM

PRESENT :

THE HONOURABLE MR. JUSTICE KURIAN JOSEPH
&
THE HONOURABLE MR. JUSTICE K.T.SANKARAN

MONDAY, THE 12TH FEBRUARY 2007 / 23RD MAGHA 1928

FAO.No. 276 of 2006()

AGAINST THE ORDER DATED 11/08/2006 IN IA.NOS.1788 OF 2005 IN
I.A.NOS.2224, 2225 AND 2226 OF 05 IN AS.NO.81 OF 2003 OF SUB COURT,
OTTAPPALAM

APPELLANT/PETITIONER:

PRIYESH, S/O.KUMARAN,
VADAKKEKARA VEEDU, PANAYOOR P.O.,
VANIAMKULAM, OTTAPPALAM TALUK,
REPRESENTED BY MUKTHIAR AGENT KUMARAN,
S/O.VADAKKEKARA PARANGODAN.

BY ADV. SRI.SANTHEEP ANKARATH

RESPONDENT: RESPONDENT::

JOHNY ABRAHAM, AGED 58 YEARS,
S/O.LATE ABRAHAM, GRACE VILLA,
PANNAYOOR P.O., VANIAMKULAM,
OTTAPALAM TALUK.

BY ADV. SRI.G.SREEKUMAR (CHELUR)
SRI.K.RAVI (PARIYARATH)

THIS FIRST APPEAL FROM ORDERS HAVING BEEN FINALLY HEARD
ON 12/2/2007, THE COURT ON THE SAME DAY DELIVERED THE
FOLLOWING:

KURIAN JOSEPH & K.T. SANKARAN, JJ.

F.A.O. NO. 276 OF 2006

Dated this the 12th day of February, 2007

JUDGMENT

Sankaran, J.

Normally we would not have entertained this appeal and interfered with the order passed by the court below but for the fact that the court below allowed the appeal and decreed the suit reversing the judgment and decree of the trial court only on the ground that the respondent in the appeal was exparte, without stating any reason on the merits of the case.

2. The respondent herein filed the suit against the appellant for realisation of money. The trial court dismissed the suit. The plaintiff filed an appeal. Notice was not personally served on the respondent in the appeal. Service was completed by affixture. Thereafter, the appeal was allowed by the judgment dated 31.10.2003, only on the ground that the respondent in the appeal (who is the appellant in this F.A.O) was absent. The appellant herein filed I.A.No.2226 of 2005 for setting aside the exparte

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decree and I.A.No.2224 of 2005 for condonation of delay of 381 days in filing the application. Those applications were dismissed for default on 22.11.2005. I.A.No.1788 of 2005 was filed by the appellant herein for restoration of those applications. The application for restoration was posted on 9.3.2006 and on that day, the appellant herein was absent and therefore, the application was dismissed. Thereafter, the appellant filed I.A.No.654 of 2006 for restoring I.A.No.1788 of 2005. The court below allowed I.A.No.654 of 2006. I.A.No.1788 of 2005 was restored. Thereafter, when the case was posted, the appellant herein was absent and therefore, the court below dismissed the application for restoration (I.A.NO.1788 of 2005) for default on 11.8.2006. That order is impugned in this appeal.

3. The appellant was not vigilant in prosecuting the applications. Even assuming that the appellant was not aware of the disposal of the appeal by the lower Appellate Court, the appellant having filed an application for setting aside the exparte decree, he should have been vigilant in prosecuting that

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application. Consistently, he had failed to appear before court and the court below cannot be faulted for dismissing the applications. However, interference is made in this appeal, as stated above, only on the ground that the appeal was allowed by the court below on the short ground that the respondent in the appeal was absent.

4. In the facts and circumstances of the case, we are satisfied that the interest of justice would be served by allowing the application for condonation of delay and also the application for setting aside the exparte decree and in directing the Appellate Court to dispose of the appeal on the merits. This direction is being issued to avoid further round of litigation after either allowing or dismissing the application for restoration and thereafter the application for setting aside the exparte decree. We also exercise our jurisdiction under Article 227 of the Constitution of India in the interests of justice, since a patent illegality was committed by the court below in allowing the appeal only on the ground that the respondent in

the appeal (appellant herein) was absent.

In the result, the appeal is disposed of in the following manner: The order impugned is set aside. I.A.Nos.2224 of 2005 and 2226 of 2005 are allowed on condition that the appellant herein shall pay a sum of Rs.5,000/- as costs to the respondent within a period of one month from today and also on condition that the appellant shall furnish security for the decree amount to the satisfaction of the court below within a period of one month. If the costs are not paid and if the security is not furnished within the aforesaid period, the F.A.O will stand dismissed with costs. On complying with the conditions mentioned above, the Appellate Court shall dispose of A.S.No.81 of 2003 on the merits, after hearing both parties.

(KURIAN JOSEPH)
Judge

(K. T. SANKARAN)
Judge

ahz/